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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~225~~ ~~20~~ 9

FREL FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 813

FRED FERNANDEZ,

Appellant,

—v.—

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

Opinion Below

The opinion of the District Court dismissing appellant's complaint is reported at 288 F. Supp. 348.

Jurisdiction

The judgment of the United States District Court for the Southern District of New York which dismissed appellant's complaint and which upheld the constitutionality of

New York Penal Law §§160 and 161 and New York Judiciary Law §§506, 609 and 661, was entered on June 26, 1968. Notice of Appeal was filed July 15, 1968 [A 4].[1] This Court noted probable jurisdiction on December 9, 1968, when it consolidated the appeal of the within case with *Samuels* v. *Mackell*, No. 580, and granted appellant herein leave to proceed in *forma pauperis* [A 72].

This appeal is prosecuted pursuant to 62 Stat. 928, 28 U.S.C. 1253.

Questions Presented

1.) Whether appellant, under indictment under New York's 1902 criminal anarchy statutes, is entitled to a declaratory judgment that the "Gitlow" statutes are unconstitutional 1.) for overbreadth and vagueness and, 2.) by reason of supersedure by federal law [the *Smith Act*]. The three-judge federal court denied the relief on the authority of *People* v. *Epton*.[2]

2.) Whether appellant, a defendant in a state court criminal proceeding charged with acts committed before New York's *Epton* decision, had a right to rely on the law and line of decisions previously enunciated by this Court as holding the 1902 statutes unconstitutional. The three-judge federal court held *Epton* was "expectable" and the *ex post*

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[1] References to the separate appendix are to "A" followed by the page number. Attached to this brief are three appendices—A, B and C being statutes involved, the original indictment and selections from the order to show cause (A 2) respectively. References to these are to "Appendix A," "B" or "C."

[2] *People* v. *Epton*, 19 N.Y. 2d 496, 227 N.E. 2d 829 (May 17, 1967) cert. den. appeal dismissed 390 U.S. 29 rehearing den. 390 U.S. 976.

facto application of this interpretation was not barred by the Constitution or otherwise.

3.) Whether New York's Judiciary Laws, which set a minimum property requirement and empowered the County Clerk to invoke subjective selection standards and under which the Grand Jury in this case was impanelled, are not unconstitutional as discriminatory on their face. The three-judge federal court held that, although the statutes appeared to be unconstitutional as to the minimum property requirement, nonetheless, the assertion by the County Clerk that the statutes were not followed supported dismissal of the complaint.

4.) Whether, under the facts alleged, appellant is entitled to declaratory relief and/or an injunction against the enforcement of unconstitutional state statutes and whether in this connection there should have been a hearing as to the facts on this issue. The three-judge federal court denied declaratory relief, an injunction and a hearing and dismissed the complaint on the ground that the possibility of ultimate Supreme Court review, after trial in the state court, was an adequate remedy.

Statutes Involved

The New York State statutes challenged in this proceeding are former Penal Law §§160 and 161[3] and former Judi-

[3] Amended effective September 1, 1967. New Penal Law section 240.15, which replaces the old anarchy sections 160-166, reads: "A person is guilty of criminal anarchy when a) he advocates the overthrow of the existing form of government of this state by violence, or b) with knowledge of its contents he publishes, sells or distributes any document which advocates such violent overthrow, or c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow.

ciary Law §§596 and 661[4] and Judiciary Law §609,[5] and are set forth in Appendix A hereto.

Preliminary Statement

This is an action for an injunction and declaratory relief against the effect of the provisions of New York's anarchy laws—the so-called "Gitlow" statutes[6]—and against the effect of the Judiciary laws providing for the selection of a Grand Jury in New York City which requires, or did at the time of the indictment, that every prospective grand juror be the owner of $250.00 worth of property and grants the County Clerk power to discriminate as to selection without setting objective standards.[7] Plaintiff-appellant is one of seventeen originally indicted in June of 1967 for the crimes of advocacy of anarchy and conspiracy to advocate the crime of anarchy against "the government." Upon motion of the defendants, the original indictment was dismissed,[8] and a new superseding indictment was filed in September, 1967, alleging, *inter alia*, that defendants advocated and conspired to advocate the crime of anarchy against the State of New York [A 17-23].

Plaintiff filed his complaint in the federal district court where he asserted that he is a black, Afro-American citi-

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[4] Amended effective September 1, 1967, to eliminate the challenged $250.00 property requirement.

[5] New Judiciary Law §609 effective September 1, 1967, requires the County Clerk to make a "special investigation of persons qualified to serve as grand jurors."

[6] New York Penal Law §§160, 161.

[7] New York Judiciary Law §§596, 609, 661.

[8] A copy of the original indictment is attached herewith as Appendix B.

zen who has joined with others in various peaceful protest activities involving the exercise of his rights of free speech, press and assembly; that the District Attorney of the County of Queens, New York, in order to harass the appellant herein and defendant below under color of the unconstitutional anarchy statutes caused his indictment by a Grand Jury which was illegally constituted pursuant to a statute which demanded a minimum property ownership and gave authority without setting objective standards to the County Clerk in the selection of such jury [A 11-13]. The indictment and arrest was accompanied by voluminous and prejudicial publicity all initiated by the defendant-District-Attorney Mackell in the interests of harassment of the indictees including Fernandez and which deprived them of their rights as citizens of the United States [Appendix C].

Fred Fernandez, the appellant herein, filed his complaint in the Eastern District of New York. George Samuels and nine other co-defendants of Fernandez filed a similar complaint for injunctive and declaratory relief in the Southern District of the United States District Court in New York. With the consent of counsel, both actions were consolidated and heard in the Southern District of New York [A 57]. Judge Frederick vanPelt Bryan ordered the convening of a three-judge statutory court under 28 U.S.C. §2281 [A 54]. Thereafter, plaintiffs in the Samuels case brought on a motion for summary judgment in which plaintiff Fernandez joined [A 3]. Papers supporting the charge that defendant Mackell had given out numerous and prejudicial press releases concerning the guilt of the defendants had been filed by plaintiffs in the case [A 2]. (See Appendix C.) Defendants filed an affidavit by Paul

Livoti, County Clerk, denying (on information and belief) that he had, in fact, ever had reason to enforce the $250.00 minimum property requirement of Judiciary Law §§596(3) and 661 [A 41-43].

After argument before the three-judge court, that court filed its opinion denying the relief sought by plaintiffs and dismissing the complaints [A 69].

Statement of Facts

The original indictment against the defendant Fred Fernandez and sixteen co-defendants contained seventeen counts.[9] Fernandez was named in the first, fourth and fifth counts and charged with the following crimes:

> 1.) Count I: acting in concert advocated orally and in writing the propriety of overthrowing the organized government by assassination of the executive officers and by force and violence and printed and published documents advocating same;
>
> 2.) Count IV: unlawfully conspiring with persons known and unknown to commit the crime of advocacy of criminal anarchy. Nine overt acts covering a period from December 9, 1965, through May 30, 1967, are enumerated. They include forming a rifle club, obtaining rifles and guns, attending classes in Aikido and Mayhem, storing printing equipment, printing a newsletter, issuing literature concerned with "deadly force" against the police, issuing literature advocating the overthrow of organized government called "The Strug-

[9] The full text of that indictment appears in Appendix B attached.

gle for Black State Power in the U.S.," obtaining and possessing pipes and gunpowder for explosives;

3.) Count V:[10] conspiring with the fifteen other defendants to commit the crime of arson in the Third Degree[11] alleging four overt acts between April 26, 1967, through May 5, 1967, involving the "observing" of a lumber yard, a tire company, storing cans of gasoline and oil and storing pipes and gunpowder.

The other fifteen counts of the indictment concerned the co-defendants and charged illegal weapons possession, as a misdemeanor and felony, and permitting premises to be used for assemblages of anarchists (P.L. §163).

Demurrers to the indictment by the defendant Fernandez and a number of other defendants were sustained by the Queens County Supreme Court[12]—particularly as to the first and fourth counts and on September 17, 1967, the same Grand Jury which had indicted the defendant in June, 1967, returned a superseding indictment against the defendant Fernandez and fourteen other of the original defendants containing forty-eight counts [A 16-34].

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[10] Except as the whole indictment is challenged by the attack on the Grand Jury impanelling statutes (Jud. Law §§596, 609 and 661) this count is not specifically at issue as arson is a Penal Law Code offense based on common law.

[11] Old Penal Law §223 provides: "A person who wilfully burns, or sets on fire a vessel, car, or other vehicle, or a building, structure, or other erection, or who wilfully and maliciously burns or sets on fire any personal property of another person, such personal property being of a value of twenty-five dollars or over, under circumstances not amounting to arson in the first or second degree, is guilty of arson in the third degree."

[12] *People* v. *Ferguson*, 55 Misc. 2d 823, 286 N.Y.S. 2d 924 (1968).

The new and superseding indictment differs from the initial indictment as to the defendant Fernandez in that "organized government" is replaced by "governments of the State and its political subdivisions." Defendant Fernandez and his co-defendants are charged with three counts of anarchy (Counts I-III).

1.) Count I charges Fernandez and his co-defendants with advocating the overthrow of the state government by the use of rifles, shotguns, firearms, bombs and ignited gasoline against publically owned and operated transportation facilities, etc., with the intent that these acts be presently attempted and accomplished [A 17].

2.) Count II charges the defendant Fernandez and his co-defendants with circulating documents which advocated and taught the doctrine that the organized governments of the State and its subdivisions "should be overthrown by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers . . . and members of the State guard . . . with the further intent that said acts be presently attempted and accomplished" [A 17-18].

3.) Count III recites that the defendant Fernandez acting in concert, became a member of and organized a group formed to teach and advocate the doctrine that organized government be overthrown as alleged in Count I [A 18].

4.) Count IV recites a conspiracy among all the defendants to commit the crimes described in the first three counts and charges nineteen overt acts in sup-

port thereof taking place between October 5, 1965, and April 23, 1967 [A 19-22].

5.) A Count V similar to the original Count V charged the defendant Fernandez and his co-defendants with conspiracy to commit arson in the third degree. The other forty-three counts did not involve Fernandez and were similar to, but more detailed than the fifteen weapons counts and permitting-premises-to-be-used-for-assemblages-of-anarchists counts of the original indictment [A 23-24].

Simultaneous with the filing of the original indictment and in June, 1967, an additional indictment was filed against two of the co-defendants of Fernandez, Ferguson and Harris, charging them with conspiracy to murder Roy Wilkins and Whitney Young. Thereafter, and from June 22, 1967, on, all the defendants including Fernandez were lumped together as conspirators in the homicide case. Defendant Mackell gave numerous press interviews linking the defendants as plotters to assassinate Wilkins and Young [B-1, B-3][13] and followers of Chinese Premier Mao Tse-Tsung [B-3, B-23]. (See Appendix C.)

The press releases and interviews of defendant Mackell referred specifically to an alleged prior criminal record of the defendant Fernandez—violating the weapons laws (not charged in the indictment) [B-18], inciting a riot (a charge of which he was never formally accused) of influencing youths between the ages sixteen and twenty-one with the R.A.M. (Revolutionary Action Movement) philosophy [B-19] which was a "revolution that would seize power in

[13] The "B" references are to the pages in the original record attached to order to show cause filed March 15, 1968 [A 2].

the United States and throughout the world by violence and assassination" [B-19]. The movement was linked by Mackell to recent race riots in other U.S. cities [B-26]. (See Appendix C.)

After the defendant Fernandez was reindicted in September, 1967, and in March, 1968, he brought the instant action by filing a complaint in the federal district court requesting declaratory relief and an injunction against the State prosecution based on the unconstitutionality of Penal Law §§160 and 161 and Judiciary Code §§596, 609 and 661 [A 11]. As to the anarchy statutes, appellant alleged that they were void on their face in violation of the First, Fifth and Fourteenth Amendments in that they were vague and indefinite and, further, that they had been superseded by 18 U.S.C. §2385 [the *Smith Act*]. As to the Grand Jury statutes, appellant asserted that the standards the law set up for the selection of the Grand Jurors which indicted him were discriminatory in that there was a $250.00 property requirement and, further, that additional subjective standards were set which vested the County Clerk with arbitrary power in the selection of Grand Jurors.

The forty-three unrelated-to-the-appellant counts of the indictment, plaintiff below asserted, have further relevance to the instant complaint because they allege that the District Attorney of Queens, the defendant-appellee in this case, has instituted a course of action designed to subject the appellant to a deprivation of rights secured him under the Constitution. In support of this allegation, appellant asserts in his complaint and later relies on documentary support [A 13], (Appendix C) that the District Attorney had issued press releases and other public statements and

has falsely connected the appellant with charges of conspiracy to murder lodged against associated co-defendants of the appellant in the instant case. These allegations supported the request for an injunction against the State prosecution.

The defendants and respondents answered the appellant's complaint and counsel for plaintiffs associated with appellant in the companion case (*Samuels* v. *Mackell*) moved for summary judgment in which appellant joined [A 10].

In opposition to the motion for summary judgment, defendants filed an affidavit by Paul Livoti, the County Clerk of Queens County, alleging that he had held office since 1958 and, that on information and belief, the $250.00 property requirement had never been enforced to exclude any person otherwise qualified [A 42].

Thereafter, respondent moved to dismiss and after argument and on June 27, 1968, the complaint was dismissed with an opinion by Judge Henry J. Friendly for the three-judge court.

The Friendly Opinion: Anarchy Statutes

In dismissing plaintiff's complaint as to the anarchy counts, the court below has accepted and endorsed the reasoning of New York's Court of Appeals in *People* v. *Epton*, *supra*. In so doing, the court below has embraced the self-contradictory ruling by the highest court of a state holding that such state court may, as it did in 1922, approve in a literal interpretation of the statutory language a criminal statute passed in 1902 and that the same state court may, as it did forty-five years later, invalidate its 1922 interpretation and again approve this criminal statute under an

entirely new gloss intended to bring its holding into line with the rulings of this Court in the forty-five year period during which the statute was moribund—and then apply this new gloss on the criminal statute retrospectively. The court below says the defendants (plaintiffs and appellants herein) should have known their "hard core" conduct was illegal and would "be prohibited under any construction [of the statute]"—that *Epton* was "expectable"

> "it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have" [A 63].

The court handled plaintiffs' protest that there was no fair warning with

> "In one sense it [fair warning] clearly was. Since the statute embraced more than it permissibly could embrace, it surely embraced the 'hard-core' activities with which they are charged . . . although an unduly broad statute is objectionable on other grounds, lack of fair warning is not one" [A 64-65].

The court termed "as somewhat artificial" plaintiff's protest that he could not anticipate the *Epton* treatment of *Gitlow*.[14]

> "No court of New York had ever told the defendants they could engage in the type of activity charged in the indictment with impunity" [A 65].

---

[14] *Gitlow* v. *New York*, 268 U.S. 652 (1925).

Said the court:

> "In any event this point, which would require an examination of defendant's state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record . . . and would afford us no basis for declaratory or *a fortiori* injunctive relief" [A 66].

and again:

> "While their [the plaintiffs'] prospect of success in the New York courts may not be bright in view of *Epton*, in this instance Supreme Court review affords wholly adequate relief" [A 66].

The Friendly Opinion: the Grand Jury Statutes

Plaintiff Fernandez had challenged former Judiciary Law §596 providing for the selection of Grand Jurors (containing the $250.00 property requirement, amended effective September 1, 1967, and a requirement that a grand juror applicant be "intelligent" and of "good character") and new §609 granting, as of September 1, 1967, authority to the County Clerk to make a special investigation and a list of those persons who, this investigation shows, are suitable to serve as Grand Jurors and former Judiciary Code §661, a form of questionnaire testing the $250.00 property qualification (from which section the $250.00 property qualification was omitted effective September 1, 1967) [A 14].

The plaintiff had originally been indicted in June, 1967, under the old Judiciary laws with the $250.00 property minimum requirement a part of the law. After a demurrer

was sustained to the original indictment, a superseding indictment was lodged by the same Grand Jury in September, 1967, after the effective date of the new laws which, while retaining the discretion of the County Clerk, eliminated the $250.00 property requirement.

The court below stated that even a modest property qualification for Grand Jurors might now be held unconstitutional. However, since the defendants-respondents submitted an affidavit of the Queens County Clerk that "the property requirement had no significance in his selection of jurors," there was "less force in plaintiff's attack" on the language of the statutes *per se* [A 68]. The court below apparently accepted defendant's affidavit as dispositive of the constitutional issue and held the issue, if any, was one to be determined by the state courts in the first instance.

The Friendly Opinion: Harassment

The court below ignored the allegations of plaintiff's verified complaint, that the prosecution is in essence a form of unjustified political and racial harassment, and deemed those allegations insufficient to support a hearing. The court held that plaintiff need have no fear as to future prosecution under the 1902 anarchy statutes since a new penal statute (Penal Law §240.15) "read in the light of *Epton* does not unconstitutionally restrict the First Amendment rights of these plaintiffs or of anyone else [A 66]."

Plaintiff's argument that a concurrent sentence imposed on the anarchy counts in conjunction with the other crimes charged could frustrate an appeal to this Court is dismissed as speculative and impossible.

"New York cannot do this so long as *Epton* stands" [15] [A 67].

Summary of Argument

Plaintiff below, Fred Fernandez, sued to obtain declaratory and/or injunctive relief against a state criminal prosecution after indictment but before trial on the grounds that the statutes defining four of the forty-eight counts of the indictment (as to anarchy) are unconstitutional as are the statutes providing for the selection of the Grand Jury

[15] If "hard core" as used by the court below means other statutorily defined criminal acts associated with the anarchy charges, this argument as to *Epton* is peculiarly relevant. Epton was convicted of criminal anarchy and conspiracy to commit criminal anarchy *and* conspiracy to riot. Although the anarchy was a felony, Epton's sentence was one year to be served concurrently—the maximum misdemeanor sentence for a conspiracy. The dissent in the Court of Appeals and this Court in a memorandum opinion concurring in the denial of certiorari by Mr. Justice Stewart gave great weight to the conspiracy to riot conviction on the theory, implied but not explicitly expressed, that conspiracy to riot must be "hard core" conduct. But see Mr. Justice Douglas' dissent, 390 U.S. 29, 30.

Fernandez, the appellant herein, is charged with four counts of anarchy and conspiracy to commit anarchy and one count of conspiracy to commit arson in the third degree. If the prosecution goes forward here, Fernandez could be tried and evidence adduced under the vague and overbroad anarchy statutes reflecting the speech or advocacy of Fernandez and others on divers occasions, which evidence could prejudice a jury as to appellant's guilt on the conspiracy to commit arson charge. Fernandez could be found guilty or acquitted of the anarchy charges. If acquitted, of course, the constitutionality of §§160 and 161 would not reach this Court. A finding of guilt on all charges including the misdemeanor arson charge and a misdemeanor sentence could also forever foreclose this Court from considering the provisions of the anarchy statutes. But the statutes would have had their "chilling effect" both as to this appellant's First Amendment rights and as to others who have ample opportunity to follow the fate of appellant and his associates in the press, on radio, and on television.

which authorized the entire indictment against the plaintiff-appellant.

The anarchy statutes (New York Penal Law §§160, 161), passed in 1902, violate the First, Fifth and Fourteenth Amendments to the Constitution, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). They were held constitutional by the highest court of the State of New York and by this Court in the 1920's [*People* v. *Gitlow*, 234 N.Y. 132 (1922), aff'd. 268 U.S. 652 (1925)] on the theory that a sedition statute applicable alike to state or national government which proscribes speech only is valid legislation even in the absence of a finding of a clear and present danger that the speech will bring about the evil the legislature sought to suppress. After *Gitlow*, New York did not again invoke these anarchy statutes until 1964 and the prosecution of William Epton, a black citizen charged with anarchy and riot for activities connected with the Harlem Riots of 1964. In *People* v. *Epton*, 19 N.Y. 2d 496 (1967) cert. den. app. dism. 390 U.S. 29, reh. den. 390 U.S. 976, the Court of Appeals of the State of New York applied a new gloss to the anarchy statutes reading into them clear and present danger and rejecting the argument from *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1955), that the *Smith Act* and related federal sedition legislation had occupied the field. The *Epton* court further rejected the argument that its new interpretation violated *stare decisis* and failed to give fair warning to a defendant charged with violation of a criminal statute which violated the Constitution further for vagueness and overbreadth. *Winters* v. *New York*, 333 U.S. 507 (1948); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1963).

In the instant case, a three-judge federal court in New York refused to interfere in the second prosecution of Negroes in New York for sedition against the state government in the face of the allegation in their complaints that they were being discriminated against racially and penalized for political protest and speech. The federal court decision relied on *Epton*, applying the new, 1967, interpretation of the law to acts and speech occurring before the New York court had discovered this gloss on the ground that the "hard core" conduct charge was "expectable." In so doing, the court below violated the First Amendment proscription against abridgement of speech and the Fifth and Fourteenth Amendments guarantees of due process of law.

Plaintiff-appellant also challenged New York Judiciary Law §§596, 609 and 661 which require a prospective Grand Juror to be the owner of property of the value of $250.00 and authorize the County Clerk to select Grand Jurors who are "intelligent," of "good character" and "well informed" without setting out any standards for such determination. These provisions are discriminatory and there is a correlation between economic and racial discrimination which, as applied to the indictment in the instant case, violates the equal protection and due process clauses of the Fifth Amendment. *Thiel* v. *Southern Pacific*, 328 U.S. 217 (1946); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

The court below relied on an *ex parte* affidavit of the County Clerk that he had not enforced the property requirement and dismissed the challenge to the lack of objective standards on the grounds that the better policy would be to await state determination of this issue.

Appellant maintains that the statutes are invalid on their face and that the court had an obligation to declare them in violation of the equal protection clause of the Constitution and that it could not make a factual finding in the absence of a hearing.

Plaintiff-appellant urges under the law established in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) and *Zwickler* v. *Koota,* 389 U.S. 241 (1967), that, at the very least, he was entitled to declaratory, if not injunctive, relief against the enforcement of unconstitutional statutes.

ARGUMENT

POINT I

New York's 1902 Anarchy Statutes Are Unconstitutional in Violation of the First, Fifth and Fourteenth Amendments to the Constitution. Enforcement of These Anarchy Statutes in 1967 Represents Ex Post Facto Judicial Legislation Which Ignores Established Principles of Fair Warning and Stare Decisis as Well as Supersedure of Federal Law as to Acts of Sedition.

History of the Anarchy Statutes

Prior to the indictment in August, 1964, and the subsequent prosecution of William Epton[16] for his role in the 1964 Harlem riots, the 1902 anarchy statutes (P.L. §160-165) were moribund. They had not been invoked by the State of New York since *People* v. *Gitlow,* 234 N.Y. 132 (1922) aff'd. 268 U.S. 652 (1925).

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[16] *People* v. *Epton,* 19 N.Y. 2d 496, 227 N.E. 2d 829 (1967) cert. den. app. dism. 390 U.S. 29—rehearing den. 390 U.S. 976.

The Appellate Division of the New York Supreme Court stated in its opinion in *Gitlow*, 195 App. Div. 773, 783, 187 N.Y.S. 783 (1st Dept., 1921):

> "After the assassination of President McKinley by an anarchist on the 6th of September 1901, it was deemed that our laws were inadequate for the protection of organized government, and it appears by [New York State] Senate Document #26 of the 125th Session in 1902 that a committee of the Senate reported for enactment certain statutes creating and defining the crime of criminal anarchy, which . . . became sections 160-166 inclusive of the Penal Law."

The Appellate Division further quoted the report of the Senate committee which drafted the laws as saying (pp. 784, 785):

> "The assassination of the late President McKinley by an anarchist who avowedly had no personal grievance against his victim, aroused the people of the nation to the recognition of the fact which thoughtful observers had already appreciated some time before, namely, that immigration of recent years had made the United States the abiding place of numbers of foreigners who, without understanding of our institutions, had brought with them views and prejudices formerly unknown in this country, and doctrines which, if put into effect, would subvert not merely our or any particular form of government, but organized government everywhere.
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> "It is not a particular crime—the murder or attempt at murder of any particular individual—which is to

be prevented by additional penal legislation or for which additional punishment is to be provided, but rather the prevention of the spreading of doctrines hostile to the safety of our government and of all government, which inevitably tend to lead those who profess them to commit crimes or at least prepare them mentally for their commission. This problem—of reaching those who profess and teach the doctrines of anarchy, without themselves attempting or committing or inciting others to attempt or commit any particular crime—is a difficult one. All will agree, however, that anarchy, by which we mean the doctrine that organized government, of whatever nature whether republican or monarchial, should be overthrown by force, is a criminal doctrine, the teaching and spreading of which should be prevented by penal legislation.

* * * * *

"Organized government must be maintained. To attack it, to preach the doctrine that it should be overthrown, is not the right of anyone . . . When it ceases, every individual is the prey of his fellows and will have no rights at all except those he can maintain by force."

Thus, the New York State legislature in 1902 and the State judiciary in 1922 agreed that the meaning and intent of the New York anarchy laws were directed at the curbing of speech.[17] This Court was equally clear in such read-

[17] In effect, the New York anarchy laws revived in one state the spirit of the Federal sedition laws of 1789 (Act of July 14, 1798,

ing of the statutes in its affirmance in *Gitlow*. In that opinion, this Court followed the principle initially enunciated in *Schenck* v. *United States*, 249 U.S. 47 (1919), to the effect, as stated by Alexander Meiklejohn, "that freedom of speech of the American community may constitutionally be abridged by legislative action."[18]

In the New York Court of Appeals, Judge Pound dissented from the majority affirmance in *Gitlow* (234 N.Y. 154-158) on the grounds that a "left wing Socialist" who aimed to change the form of government and to substitute therefor another form of organized government could not properly be called an anarchist as intended by the 1902 legislature or as defined in Penal Law §§160-166. In this Court, affirmance brought the dissent of Justices Holmes and Brandeis which sought to extend the protection to speech afforded by the "clear and present danger" doctrine propounded by Holmes for the majority of the Court in *Schenck*.

The court below, in the instant case, found no difficulty, however, in formulating an entirely novel and updated interpretation of the 1902 anarchy statutes. Judge Friendly, author of the opinion, was able to rely on the Court of Appeals year-old opinion in *Epton* to support a 1967 redefinition of anarchy for application to communists

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1 Stats. at Large 596). The nation had repudiated the sedition laws within the first decades of the 19th century, not through any specific interpretation by this Court but through rejection by juries and finally through repeal by the Congress. For a discussion of this history see Appellant's Brief on Appeal in this Court in *Gitlow* v. *New York*, Oct. Term, 1922, No. 19 Vol. 95, pp. 41-97.

[18] Alexander Meiklejohn *Free Speech in its Relation to Self Government* p. 30, Harper and Row, New York, 1948.

(in *Epton*) or alleged black revolutionaries (as Fernandez is charged). As the court below said:

> "... that Court [*Epton*] ... reinterpreted the criminal anarchy statute 'in accordance with sound constitutional principles so as to preserve its constitutionality'" [A 63].

The hazards of legislation, especially by states and local governments, in the sensitive heartland of the First Amendment rights of the sovereign citizen, are thus amply documented in the present case. The vagueness and overbreadth of the language that must necessarily be employed in such legislation explain the divergence in interpretation of New York Penal Law §§161-166 as between the 1902 rationale of the New York Senate Committee, the 1922 opinion of the New York Court of Appeals in *Gitlow* and the affirmance by this Court in 1925, on the one hand, and the new meaning in the statutes discovered by the Court of Appeals in *Epton* in 1967. That new meaning was endorsed and accepted by the court below as of 1968 and is now before this Court. Such vagueness and overbreadth set the trigger for the further hazard of judicial *ex post facto* legislation, as in the instant case. Changing Supreme Court standards from 1919 to date foreclose a valid conviction in the light of the defenses of due process represented by *stare decisis*, fair warning and federal supersedure, as to state anarchy statutes passed in 1902.

Stare Decisis Ignored

The embarrassing contradiction in the interpretation of the New York anarchy statutes as between *Gitlow* and *Epton* is dismissed by the court below when it expresses

incredulity at appellant's complaint of uncertainty and illegality in these diverging interpretations:[19]

> "They [the appellants] contend that the Court of Appeals had no power in 1967 to give the statute a narrower reading than the same court had found in 1922 to be the intent of the legislature in 1902. We do not understand why; it seems quite reasonable for the court to have ruled that if the 1902 legislature had known it could not have all it wanted, it would have wanted all it could have" [A 63].

The acceptance of this premise by the court below following the *Epton* court, rejects the doctrine of *stare decisis* as well as what appears to the appellant as a direct holding by this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). The latter decision was available to the *Epton* court at the time of its decision (May, 1967) but was rejected by it.

The reading into the statutes (§§161-166), for the first time in their sixty-five year history, of the requirement that they call for a showing of clear and present danger before the speech involved may be outlawed was a clear break with the doctrine of *stare decisis.* This Court's majority opinion read clear and present danger out of *Gitlow* in 1925. Said Judge Burke in his dissent in *Epton* (at p. 509):

> "The usual rule is that once a statute has been interpreted by the courts this interpretation becomes as

[19] To these various interpretations must be added the respondent District Attorney Mackell's interpretation of the statutes in June, 1967, as evidenced by his numerous press releases describing the crimes under the anarchy statutes of the appellant Fernandez and his co-defendants. [See Appendix C herewith.]

much a part of the enactment as if incorporated into the language of the act itself and is binding on subsequent courts in accordance with the rule of *stare decisis* and the doctrine of precedent (See McKinney's Cons. Laws of N.Y., Book 1, Statutes, §72, and the cases cited therein). Today, however, this principle is rejected on the ground that statutes are to be construed so as to preserve them from unconstitutionality, if possible (see *People* v. *Finkelstein,* 9 N.Y. 2d 342), a sound enough guide to construction, but only a guide, and out of place where construction is not called for, where we know from the language of a statute and from its history what it was the Legislature intended to achieve in enacting it. When as here, we have once ascertained what the Legislature sought to do in enacting a statute (and in the case of our criminal anarchy statute we can have no real doubt that our Legislature did in fact intend to make unlawful the mere advocacy of such doctrine, with no requirement that this advocacy constitute a clear and present danger) the nature of our function demands that we adhere to our earliest interpretation of the statute. We are not an extension of the Legislature, authorized to rewrite statutes through constant 'reinterpretation' designed to effectuate what we devine the Legislature *would* or *should* now desire the law to be."

Vague and Overbroad

As to *Keyishian,* the court below and the *Epton* court seemed to ignore what this Court there said about New York's anarchy laws [Penal Law §§160 and 161].

In *Keyishian,* this Court said that the proscription in Penal Law §161 as to "advocacy of criminal anarchy" as a

statutory definition gave the "possible scope of 'seditious' utterances and acts," "virtually no limit." This Court struck down the complicated provisions of New York Education Law §3021 primarily because of the reference to Penal Law §§160 and 161 for the definition there of "seditious." The state court chose to ignore what this Court said in *Keyishian* and innovated its own doctrine of expediency in statutory interpretation in order to read §§160 and 161 "in harmony with the Federal Constitution" —which in effect was *ex post facto* judicial legislation. In so doing, the state court also misapplied the logic of prior decisions in *Dennis* v. *United States,* 341 U.S. 494 (1951); and *Yates* v. *United States,* 354 U.S. 298, 312, 313 (1956); *Scales* v. *United States,* 367 U.S. 203 (1961); *Noto* v. *United States,* 367 U.S. 290 (1961).

The view of the court below on judicial restraint or federal abstention is particularly hard to understand since certainly that court had the benefit of this Court's language in *Keyishian.* The court below said:

> "In any event, if the Court of Appeals [in *Epton*] transcended the powers vested in it by the people of New York by narrowing its previous construction of the criminal anarchy statute, which we in no way intimate, this would be entirely a matter of state law and not one of federal concern" [A 63, 64].

In *Epton*—apparently on the principle that a court should construe a statute so as to preserve its validity at almost all costs—the Court of Appeals of the State of New York gave that state's 1902 anarchy statute a new and 180-degree different gloss from that applied by the same court in 1922 in *Gitlow* (affirmed by this Court in 1925).

In this reversal of itself, New York's highest court passes over principles of constitutional construction that decree stricter standards of interpretation when a state statute is challenged on grounds of vagueness than those applied to federal legislation. This Court has upheld still stricter standards where the state statute has "a potentially inhibiting effect on speech," for "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser" *Smith* v. *California,* 361 U.S. 147, 151 (1959).[20]

The three-judge federal court below joined the New York court in *Epton* in derogation of this same principle, long followed by this Court, that holds state legislation more accountable on grounds of vagueness than federal legislation, *Baggett* v. *Bullitt,* 377 U.S. 360, ftnote 370 (1964). This Court has created and traditionally maintained a buffer zone at the periphery of such Bill of Rights freedoms as are protected by the First Amendment, hedging those freedoms from invasion by state legislation. See *De Jonge* v. *Oregon,* 299 U.S. 353 (1937); *Herndon* v. *Lowry,* 301 U.S. 242 (1937); *Winters* v. *New York,* 333 U.S. 507, 509-10 (1948); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961); *Bouie* v. *City of Columbia,* 378 U.S. 347, 351-352 (1963); *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 428 (1963); *Baggett* v. *Bullitt, supra,* 372. Cf. *The Void for Vagueness Doctrine,* 109 Pa. L. R. 67, 81-84 (1960). Cf.

[20] In *Smith,* this Court has said

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional application of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution" (p. 151).

re federal legislation: *Watkins* v. *United States,* 354 U.S. 178, 197-99 (1957); *United States* v. *C.I.O.,* 335 U.S. 106, 140-42, 146, 150-53 [Rutledge concurring (1948)].

Dennis Distinguished

Thus, *Dennis* v. *United States,* 341 U.S. 494 (1951), where a federal statute patterned after New York's anarchy laws was upheld by this Court, can be distinguished from the case at bar on more than one ground.

1.) *Dennis* involved a federal statute, commonly known as the *Smith Act,* passed by Congress, not a state legislature, in 1940. As compared with state legislation in similar areas, this Court has found reasons to invalidate state legislation more generally than federal legislation over which it has a more flexible and responsive power of control.[21]

This point was further underscored in *Yates* v. *United States,* 354 U.S. 298, 319 (1957) where this Court said:

> "We need not, however, decide this issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so, we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had been construed as terms of art carrying a special and limited connotation."

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[21] Says the author in 109 Pa. L.R. 67, 83 "Except for §4 of the Lever Act involved in Cohen (*United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81 [1921], . . . no federal statute has ever been declared unconstitutional for vagueness."

The "judicial measure of constitutional applicability" (*Dennis*, p. 515) should certainly depend on the intent of the legislature at the time it passed the legislation—not judicial inspired reasoning which can find no basis in law at the time of the passage of the legislation or of its latest judicial interpretation but one.

2.) This Court was construing the *Smith Act* after Congress had passed it in 1940 with full knowledge of the doctrine of "clear and present danger" first enunciated by this Court in *Schenck* v. *United States*, 249 U.S. 47 in 1919. (See *Dennis*, p. 503.) Although patterned on New York's anarchy statute, the *Smith Act* was passed by Congress with the Communist Party and Communist doctrine in mind (*Dennis*, p. 547). The New York legislature, acting in 1902, could know nothing of the black power movement in the sixth decade of the 20th century nor could it anticipate with any degree of definiteness what conduct the District Attorney of Queens County would seek to proscribe as criminal by the indictment in this case.

Since *Keyishian*, five three-judge federal courts have rejected the *Epton* rationale and followed *Keyishian*, contrary to the instant case, in declaring state sedition and anarchy statutes invalid as unconstitutionally vague and overbroad. *Ware* v. *Nichols*, 266 F. Supp. 564 (N.D. Miss., 1967); *Carmichael* v. *Allen*, 267 F. Supp. 985 (N.D. Ga., 1967); *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky., 1967); *Harris* v. *Younger*, 266 F. Supp. 564 (C.D. Cal., 1968) [Prob. Juris. noted Jan. 13, 1969]; *Baker* v. *Binder*, 274 F. Supp. 658 (W.D. Ky., 1967). See *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 Cal. L. Rev. 702 (May, 1968); *Variation on the Theme of Dom-*

browski v. *Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights,* Wisconsin L. R. 1968, p. 369.

Supersedure

In speaking of the advocacy of overthrow of the government by force and violence, the New York anarchy statutes [Penal Law §§160, 161] seek to invoke for the state government an unconstitutionally broad sweep of power. The "government" under the statutes is that of the United States as well as the State of New York.[22]

> "it is fair to assume that the legislature had in mind the protection of this state, the states of the Union and of the Union itself. We may fairly assume that the legislature would think of self-preservation rather than the protection of foreign governments. When, therefore, in these sections, it used the words 'organized government' it must have referred to all organized government in this country, whether it be that of city, state or nation. To advocate the destruction of the government of the City of New York, or of the United States by force or by unlawful means . . . is a violation

[22] In the record below, there is no question that the District Attorney intended to charge Fernandez and his co-defendants with advocacy of overthrow of the government of the United States as charged in the original June, 1967, indictment. (See Appendix C.)

Furthermore, the thrust of this instant complaint is against the statute itself, not merely the somewhat narrowly drawn superseding indictment which charges the defendant with acts directed solely against the state government. Says Professor Paul Freund in *The Supreme Court and Civil Liberties,* 4 Vanderbilt L. Rev. 533, 537 (1951)

> ". . . in matters of civil liberty a prior restraint is more vulnerable than penalties after the act, and that a law abridging civil liberties is to be judged on its face."

of these sections of the penal law." *People* v. *Gitlow*, 234 N.Y. 132, 136 (1922).

In *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1955), this Court has ruled that the *Communist Control Act of 1954* [including the *Smith Act*] evinces "a congressional plan which makes it reasonable to determine that no room has been left for the state to supplement it. Therefore a state sedition statute is superseded regardless of whether it purports to supplement the federal law." Thus it is clear that, if §§160 and 161 were ever constitutional, the holding in *Nelson* establishes federal supersedure of state law in the field of sedition. And courts in many jurisdictions have accepted and followed this interpretation. *Commonwealth* v. *Gilbert*, 334 Mass. 71, 134 N.E. 2d 13 (Sup. Jud. Cty., 1956); *Commonwealth* v. *Hood*, 334 Mass. 76, 134 N.E. 2d 12 (1956); *Commonwealth* v. *Dolson*, 183 Pa. Super. 339, 132 A. 2d 692 (1957); *Braden* v. *Commonwealth*, 291 S.W. 843 (Ky., 1953); *Albertson* v. *Millard*, 345 Mich. 519, 77 N.W. 2d 104 (1956); *State* v. *Jenkins*, 236 La. 300, 107 So. 2d 648 (1958) but see *State* v. *Cade*, 244 La. 534, 153 So. 2d 382 (1963); *State* v. *Levitt*, 203 N.E. 2d 821 (Ind., 1965) and *Levitt* v. *Dillon*, Civ. Action 1 P. 65-C-462 S.D. Ind. [dismissed by stipulation].

The Court of Appeals in *Epton* and the court below in endorsing that opinion, effectively overruled this Court's decision in *Nelson* by stating "subsequent pronouncements by the Supreme Court have restricted the scope of the *Nelson* opinion and have left the defendant's contention [as to supersedure] without merit." There is a dictum in *Uphaus* v. *Wyman*, 360 U.S. 72 (1959), cited by the *Epton* court that this Court was not of the same mind there as in *Nelson*, i.e., that the *Smith Act* supersedes state sedition

legislation covering the same conduct and proscribing advocacy of overthrow of local, state and national government as does §§160 and 161.[23]

Uphaus said of *Nelson*: "The opinion made clear that a State could proceed with prosecutions for sedition against the State itself."[24] Since *Nelson* said precisely the opposite and since *Uphaus* concerned a legislative investigation, —nor did this Court there have occasion to construe or review any legislation,—it is here submitted that *Uphaus* should be confined to its facts and that the better view be adopted, i.e. that *Nelson* meant what it said when it analysed how the federal government had effectively occupied the field with its legislation in the area of sedition [*the Smith Act*, 18 U.S.C. §2385, *the Internal Security Act of 1950*, 50 U.S.C. §781 et seq. and *the Communist Control Act of 1954*, 50 U.S.C. (1955 Supp.) §481] and when it said

"Sedition against the United States is not a *local* offense. It is a crime against the *Nation*" (p. 505).

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[23] See dissent of Judge Wisdom in *Dombrowski* v. *Pfister*, 227 F. Supp. 556, 600 (E.D. La., 1964) rev'd on other grds. 380 U.S. 479 (1965).

[24] In New York, the legislature has provided a battery of crimes and offenses which could be invoked to prevent or penalize overthrow or attempts at overthrow of the New York State government. Penal Law sections effective in 1967 which could conceivably cover the alleged criminal acts of the appellant and his co-defendants are: Assault §240-245; Attempt §260; Conspiracy §580; Disorderly Conduct §722; Homicide §1040; Mob Violence §1390; Disturbing Lawful Meetings §1470; Attempting to Prevent Officer from Performing Duty §1824; Resisting Officer §1825; Resisting Public Officer in the Discharge of His Duty §1851; Explosives and Combustibles §1894; Endangering Life by Maliciously Placing Explosives Near Building §1895; Making and Disposing of Dangerous Weapons §1897; Riot §§2090, 2091; Unlawful Assemblies §§2092, 2093, 2094, 2095. These sections were repealed by the enactment of a new penal law effective September 1, 1967, but the substance of the crimes are generally carried over to the new law.

and further

> "Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned by Mr. Justice Jackson [multiplicity of tribunals and diversity of procedures], but the added conflict engendered by different criteria of substantive offenses" (p. 509).[25]

Judicial Ex Post Facto Legislation In Futuro

The court below further held that *Epton* not only validated §§160 and 161 but also upheld the new Penal Code §240.15.[26] This holding can only be gratuitous since the new statute was not squarely before the court below nor do we have any holding on its meaning or effect from the New York courts at this writing, unless *Epton* can be construed as the state's highest court anticipatorily legislating an anarchy statute later ratified by legislative action—an apparent breach of the doctrine of separation of powers.[27]

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[25] After *Nelson*, Congress did not modify the rule and in fact, proposed federal legislation to change the *Nelson* holding failed passage in the 86th Congress (1958). See HR 305, 86th Cong., 1st Sess.

[26] Query: If §§160 and 161 were constitutional and valid on May 17, 1967 [the date of the *Epton* decision], why did the state legislature pass a new anarchy statute effective September 1, 1967, which, *inter alia*, excluded action against the federal government and confined the target for the illegal conduct described to state governments only? Judge Friendly does not credit the New York State legislature with any intent. The new law was not necessary and reflects no change in the law, says the court below.

[27] Judge Friendly's opinion suggests that the constitutionality of Penal Law §240.15 could be before this Court in this case. Appellant does not concede the constitutionality of the new statute, maintaining that it too suffers from overbreadth and vagueness and that it has been superseded by federal law.

No Fair Warning

The court below strains at a distinction between the case at bar involving anarchy charges and *James* v. *U.S.*, 336 U.S. 213, 225 (1961). In *James*, this Court noted its previous decisions had held that embezzled funds were not taxable; the Court then reversed this earlier holding, but refused to apply its new judicially-arrived-at rule retroactively—that would be unfair. With respect to the present case, the court below says:

> "No court of New York had ever told the defendant they could engage in the type of activity charged in the indictment with impunity" [28] [A 65].

The plaintiffs, however, had been told by this Court that *Gitlow* was no longer the law in *Dennis* v. *United States*,

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[28] Judge Friendly challenges the allegations of the complaint—minimizing its thrust on an *ad hoc* basis saying

> "Neither the complaints nor the moving affidavits allege that plaintiffs entertained the beliefs their lawyers now ingeniously imputed to them . . . In any event this point, which would require an examination of defendants' state of mind, is the sort of issue that becomes ripe for constitutional adjudication only upon a fully developed record . . ." [A 65, 66].

Mr. Justice Brennan spoke for this Court, however, in *Bouie* v. *City of Columbia*, 378 U.S. 347, 355, when he said in a footnote

> "We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibition must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants."

Said this Court in *Dombrowski* v. *Pfister*, 380 U.S. 479, 486:

> "For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."

341 U.S. 494, 507 (1951), which opinion was later to be confirmed by this Court in *Keyishian, supra.* They had further been told that they could not be prosecuted by a state for the expression of seditious ideas, *Pennsylvania* v. *Nelson, supra.* They were entitled to rely on their rights under the First Amendment in the absence of definitive language from the New York courts. *Bouie* v. *City of Columbia,* 378 U.S. 347 (1963); *Pierce* v. *U.S.,* 314 U.S. 306, 311 (1941). Is the difference between *James* and appellant—to wit: that the former was a proven embezzler and the appellant a black American citizen charged with advocacy of unpopular ideas about government—sufficient to give the benefit of the law to the former and deny it to the latter? Since they were both charged with criminal statutes newly court interpreted, are they not, at the very least, equally entitled to be relieved of punishment applied retrospectively?

The present case is better distinguished from *James* in the light of the plain language of the First Amendment. No words there suggest that the plaintiff-appellant—or any other citizen—must wait to be told by the courts of the State of New York—or by the court below—what "type of activity" he may "engage in . . . with impunity."

POINT II

The Provisions of the New York State Judiciary Law Establish Subjective Criteria for the Selection of Grand Jurors Along With Discriminatory Economic Criteria of Ownership of Property and Are Violative of the Equal Protection Clause of the Fifth Amendment as a Matter of Law.

The Grand Jury which originally indicted the defendant Fernandez in June, 1967, was impanelled under old Judiciary Law §§596 and 661. Section 596(3) states unequivocally that as a qualification to serve, a Grand Juror must "[B]e the owner" or the spouse of the owner "of real or personal property of the value of two hundred and fifty dollars." Section 596(6) requires that he "[B]e intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly." [20] Section 661 is a questionnaire embodying a question as to the $250.00 property qualification.

This same Grand Jury was still sitting when the superseding indictment challenged in the instant case was returned in September, 1967, after the effective date of changes in the law that responded, in part, to the questions about the fairness and legality of these statutes raised here. As of September 1, 1967, the New York legislature eliminated the $250.00 property requirement. The legislature

[20] Of course, this means that the County Clerk under the law must decide whether or not the prospective Grand Juror is the owner of the required property—this is easily susceptible to objective proof but is a monetary qualification. Not as easy to imagine is how the County Clerk determines whether or not the prospective Grand Juror is "intelligent" or of "good character" or "well informed."

retained, however, the §596(6) requirements as to intelligence and good character and added a section 609(1) which requires the County Clerk of each county to "make a special investigation of persons qualified to serve as trial jurors."

It would appear from these sections that, at least at the time the Grand Jury which indicted the appellant herein was selected, there was a $250.00 property requirement and, further, that the County Clerk was empowered to decide which prospective jurors met the intelligence and good character requirements. The statutes specified no standards to assure a defendant—particularly a poor, black or Puerto Rican defendant—that the Grand Jury which indicted him represented a fair cross-section of the community.

This court has recognized the "invaluable function" served by the State Grand Jury "as a primary security to the innocent against hasty, malicious and oppressive persecution," and by "standing between the accusor and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason and was dictated by an intimidating power or malice or illwill." *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962), quoted in *Chestnut* v. *New York,* 370 F. 2d 1, 3 (C.A. 2, 1966), cert. den. 386 U.S. 1009.

The arbitrary power granted to the County Clerk to make his subjective determination as to who should be selected as Grand Jurors is similar to the power of state election officials that was struck down by this Court in *Louisiana* v. *United States,* 380 U.S. 145 (1965). A Grand Jury should represent a cross-section of the community.

Cf. *Rabinowitz* v. *United States,* 366 Fed. 2d 34 (C.A. 5, 1966); *Thiel* v. *Southern Pacific,* 328 U.S. 217 (1946); *Labat* v. *Bennett,* 365 F. 2d 698 (C.A. 5, 1966); *Whitus* v. *Georgia,* 385 U.S. 545 (1967).

The opinion of the court below in dismissing the complaint and endorsing the constitutionality specifically of the $250.00 property qualification is difficult to understand for the court itself says:

> "We have little doubt that, despite the decision of this court in *United States* v. *Foster,* 83 F. Supp. 197 (S.D. N.Y., 1949), cf. *Fay* v. *New York,* 332 U.S. 259, 291-94 (1947), application of even a modest property qualification for grand jurors might now be held unconstitutional, cf. *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946); *Labat* v. *Bennett,* 365 F. 2d 689, 723 (5 Cir., 1966); cf. *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966), and New York has acted wisely in abolishing it" [A 68].

The court below sought to minimize its own conclusion that an imposition of a property requirement would be unconstitutional by referring to an affidavit of the County Clerk—sworn to on information and belief [A 42] *not knowledge* to the effect that in practice he had not followed the law.

This summary dismissal of plaintiff's complaint on the basis of a lone affidavit based on alleged facts neither open nor available to rebuttal by the planitiff-appellant does not seem an adequate or judicial answer to a challenge to a statute on its face. By its ruling, the court below found there was a factual issue, but disposed of it arbitrarily without taking evidence—satisfied with the ex-parte-belief

affidavit of a County Clerk—in what is certainly a denial of due process on the very premise stated by the court: "that even a modest property qualification for Grand Jurors might now be held unconstitutional" [A 68]. Nor is this a mere cavil or attempt to secure an abstract opinion in the absence of direct injury from enforcement. See *Poe* v. *Ullman*, 367 U.S. 497, 504, 505 (1961).

Appellant Fernandez alleged in his complaint that he, a black Afro-American, was aggrieved by the conduct of the District Attorney and the Attorney General in curtailing his peaceful protest activities. The economic criteria for questioning citizens as to their property ownership amounts to racial discrimination because, as all social and economic indices show, the distribution of Negro citizens on every scale of socio-economic status is inverse to the distribution of white citizens. The discrimination is inherent in the standards set by the legislation. Thus, the minimum property ownership requirement itself excludes half of the New York City Negro and Puerto Rican population from consideration as Grand Jurors while excluding not much more than ten percent of the white population.[30] The mere statement that this is not enforced by one County Clerk cannot be decisive in any way in the absence of an evidentiary hearing. Cf. *Whitus* v. *Georgia, supra.*

Discrimination of a similar nature is provided for in the subjective standards which the clerk is empowered to apply in selecting Grand Jurors. Thus the 47 percent of the Negroes who did not finish grammar school will not be

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[30] "Survey of Consumer Expenditures, 1960-1961," Supplement 2, *Bureau of Labor Statistics Report*, No. 237-93, June, 1966: "Consumer Expenditures and Income, Cross Classification of Family Characteristics," Table 22b, p. 69.

found "intelligent" or "well informed" by the County Clerk who will have doubtless enjoyed the benefit of a high school education or better as do more than 60 percent of the white population."[31]

The court below ignored the discriminatory aspects of the Grand Jury legislation which appear on the face of the legislation declaring that plaintiff-appellant's remedy, if any, was an appeal in the New York courts and for review in this Court.

A brief review of the case law does not support the probability of success along these lines. See *People* v. *Agron*, 10 N.Y. 2d 130 (1961); *People* v. *Dessaure*, 299 N.Y. 126, 132 (1949) cert. den. 337 U.S. 949; *People* v. *Prior*, 294 N.Y. 405 (1945); *People* v. *Horton*, 18 N.Y. 2d 355 (1966); *Chestnut* v. *New York*, 370 Fed. 2d 1 (C.A. 2, 1966), cert. den. 386 U.S. 1009; *People* v. *Thomas*, 53 Misc. 2d 427 (Onondaga Cty., 1967); *People* v. *Ruppert*, 53 Misc. 2d 845, 279 N.Y.S. 2d 895 (Westchester Cty., 1967); *People* v. *Cohen*, 54 Misc. 2d 873, 283 N.Y.S. 2d 817 (Kings Cty., 1967); *People* v. *Smith*, 54 Misc. 2d 902, 283 N.Y.S. 2d 594 (Genesee Cty., 1967); *U.S. ex rel. Epton* v. *Nenna*, 281 F. Supp. 388, 390 (S.D.N.Y., 1968).

This Court has recently said in rejecting the doctrine of abstention urged by the court below that the federal courts are proper forums for the adjudication of human rights under the federal constitution, *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967). Cf. *Baggett* v. *Bullitt*, 377 U.S. 360, 375, 376, ftnote and cases there collected (1964). Nor is the Equal Protection Clause shackled to the political theory of

[31] *United States Census of Population, 1960*, United States Summary, General Social and Economic Characteristics, PC (1) 1C. Table 76, p. 1-207.

a particular era. Just as the constitution requires equal participation for all voters absent any economic requirement [*Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668, 669 (1966)] so there are similar requirements for the equal and democratic selection of Grand Jurors under legislation which does not give leave to the County Clerk to exclude a large portion of the poor at his option.

POINT III

Plaintiff's Challenge in the Federal Court of Unconstitutional State Anarchy Statutes and State Legislative Procedures for Selecting Grand Jurors Entitled Him to Declaratory Relief and/or an Injunction if Necessary.

Plaintiff-appellant has launched a double-barrelled attack on the statutes responsible for his indictment in the New York Queens County Court in 1967 for the crimes of anarchy and conspiracy to commit arson in the third degree.

He alleges, in effect, that the entire prosecution is an infringement of his rights to speak and associate and protest under the First Amendment and that the invocation of a 45-year-old, apparently moribund, anarchy statute underlines the discriminatory nature of the attack on him and his fellow criminally-charged defendants for asserting their First Amendment rights.[32] In further support of this al-

[32] For a discussion of black power advocacy and its relationship to criminally punishable speech and the manner in which the courts have invoked sedition statutes in recent years against protest of the black community and its spokesmen see *Black Power Advocacy: Criminal Anarchy or Free Speech*, 56 Cal. L.R. 702 et seq. (May 1968).

legation, plaintiff complains of the composition of the Grand Jury which indicted him as not being composed of a cross-section of the community—and so not a jury of his peers, economically or racially—because, perforce, the statutory basis for the selection of Grand Jurors mandates an improper objective economic test ($250.00) and, improper subjective standards of selection to be applied by the County Clerk.

He further asserts he has at least made out a prima facie case [the allegations of which were untested by an evidentiary hearing in the lower court at the time that court dismissed his complaint] that he is entitled to declaratory and injunctive relief from improper prosecution.

Under the teachings of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), he has shown 1.) that his prosecution has been brought under statutes [§§160 and 161], vague and overbroad on their face, and 2.) that such prosecution has been brought in bad faith, for the purpose of discouraging and intimidating the appellant and others in the exercise of First Amendment rights [*Dombrowski,* pp. 489-92]. [See also *Variations on the Theme of Dombrowski* v. *Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights,* Wisconsin L. Rev., 1968, p. 369.]

Necessarily, in examining the question of plaintiff-appellant's request for declaratory and/or injunctive relief against the effect of unconstitutional statutes, the issue arises as to whether or not this is an appropriate case for federal intervention.

In the face of a clearly unconstitutional statute, this Court has abstained from granting relief. *Douglas* v. *City*

of Jeanette, 319 U.S. 157 (1943). Cf. *Poe* v. *Ullman*, 367 U.S. 497 (1961). Mr. Justice Fortas has said "*Dombrowski* is strong medicine. It involves the interposition of federal power at the threshold stage of the administration of state criminal laws." [33]

There is language, however, in recent decisions of this Court that the federal system cannot shirk its obligation to exercise its supervisory power in the implementing of constitutional doctrine, particularly in issues involving the First Amendment at the threshold stage of litigation. This Court said, in *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967):

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give the respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly escape from that duty is not permissible merely because state courts also have the solemn responsibility equally with the federal courts, ' . . . to guard, enforce and protect every right granted or secured by the Constitution of the United States . . . ' (*Robb* v. *Connally*, 111 U.S. 624, 637)."

In *Zwickler*, where the assertion was made that the statute challenged was not void for vagueness, but for overbreadth, this Court rejected the doctrine of abstention holding that where

> "the attack upon the statute on its face is for repugnancy to the First Amendment . . . to force the

[33] *Cameron* v. *Johnson*, 390 U.S. 611, 614 (dissent) (1968).

> plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect . . . " (at p. 252).

The teaching of *Zwickler* is that it is only where there are "special circumstances" which would warrant abstention should such doctrine be applied, and that otherwise it is error for the federal court to avoid passing on the issue.

In the case at bar, appellant has challenged the anarchy and Grand Jury statutes on their face and in the preceding argument (Points I and II) has demonstrated the reason why this Court should declare the patently unconstitutional legislation invalid. The anarchy statutes clearly abridge freedom of expression and, as applied in conjunction with the Grand Jury statutes, they effectively succeed.

This is not to withdraw appellant's request for injunctive relief. Declaratory relief, however, would appear to be sufficient and plainly in order under all the circumstances.[24]

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[24] Appellant is aware of the issue as to whether or not 42 U.S.C. §1983, pursuant to which plaintiff lodged his complaint would authorize the injunction for which he also asks, in view of 28 U.S.C. §2283. See *Dombrowski*, *supra*, pp. 484, 497; *City of Greenwood* v. *Peacock*, 384 U.S. 808, 829, 830 (1966). Cf. *Cameron* v. *Johnson*, 390 U.S. 611, 614 (1968), 8 A.L.R. 3d 301 et seq. *Federal Injunction and State Enforcement of Invalid Criminal Statutes*, 65 Col. L.R. 647 (1965). It would seem, however, at this juncture that declaratory relief would effect plaintiff-appellant's purpose in calling off the instant prosecution.

Conclusion

This Court should reverse the judgment of dismissal of the District Court and declare the statutes challenged in contravention to the Constitution of the United States.

Respectfully submitted,

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Fred Fernandez

ERRATUM

Erratum in separate appendix heretofore filed with the Court on January 24, 1969 (being a copy of Judge Friendly's opinion for the three-judge court below)

P. 63, line 4, "*People* v. *Gitlow, supra,*" should read "*People* v. *Epton, supra.*"